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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS H. THORNER, et. al.,
Cross-Petitioners,

VS.

WYNEMA ANNA CROSS, Executrix, et al.,
Cross-Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 9(e) of the Securities Exchange Act of 1934 requires an investor to commence an action for violation of Section 10(b) within one year of actual discovery of the facts constituting the violation, as opposed to within one year of the date on which the investor, in the exercise of reasonable diligence, should have discovered the facts constituting the violation.

2. Whether, for purposes of the one-year limitations period of Section 9(e) of the Securities Exchange Act of 1934, a securities issuer's rescission offer implemented in settlement of an SEC enforcement action operates, as a matter of law, to put investors (including investors in subsequent separate securities offerings) on notice of a wholly distinct fraudulent scheme perpetrated by the issuer, where (a) the limited violations of law alleged by the SEC have seemingly been cured by the rescission offer prospectus, (b) no other evidence of fraud by the issuer is apparent, and (c) the jury specifically found that such investors did not discover and could not with reasonable diligence have discovered the fraud until 28 months later.

3. Whether the doctrine of equitable estoppel enunciated by this Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), is inapplicable as a matter of law to cases subject to Section 9(e) of the Securities Exchange Act of 1934.

PARTIES TO THE PROCEEDING

Cross-petitioners are respondents to the petition herein. Cross-respondents are petitioners herein.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case prior to consideration by this Court of petitioners' challenge to the constitutionality of Section 27A of the Securities Exchange Act of 1934.

OPINIONS BELOW

The initial opinion of the court of appeals (App. 1a-50a[1]) is reported at 939 F.2d 1420, and the order denying cross-petitioners' motion for rehearing (App. 51a-55a) is reported at 947 F.2d 897. The opinion of the court of appeals on remand from this Court (App. 56a-95a) is reported at 977

[1] "App." refers to the separately bound appendix to the pending petition for a writ of certiorari in *William H. Dennler, et al. v. Robert S. Trippet, et al.*, No. 92-1003, filed December 11, 1992.

F.2d 1533. The opinion of the court of appeals denying in part and granting in part the motion for rehearing of cross-respondents (App. 98a-108a) is reported at 977 F.2d 1549. The order of the district court entered October 17, 1988 rejecting cross-respondents' statute of limitations defenses (App. 109a-111a) is unreported. The final judgment of the district court (excluding appendices thereto) entered November 16, 1989 (App. 112a-127a) is reported at [1989-90 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,970.

JURISDICTION

The petition for a writ of certiorari herein was received on December 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. This cross-petition is timely under Supreme Court Rules 12.3 and 13.5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution; Sections 9(e), 10(b) and 27A(a) of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e), 78j(b) and 78aa-1(a); Section 13 of the Securities Act of 1933, 15 U.S.C. § 77m.

STATEMENT

1. This cross-petition seeks review of the same judgment of the Tenth Circuit which is the subject of cross-petitioners' pending Petition for a Writ of Certiorari in *William H. Dennler, et al. v. Robert S. Trippet, et al.*, No. 92-1003, filed December 11, 1992 (hereinafter "Dennler Petition"). Cross-petitioners incorporate herein by reference the Statement set forth therein at pages 2-12.

2. The court of appeals, in its first opinion (App. 1a-50a), as amended on rehearing (App. 51a-55a), reversed

cross-petitioners' judgments under Section 10(b) of the Securities Exchange Act of 1934 (the "1934 Act"), 15 U.S.C. § 78j(b), applying the limitations period in Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), as announced in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773 (1991). The court of appeals' reasoning was substantially similar to the reasoning employed in reversing cross-petitioners' judgments under Section 11 of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77k. *See* Dennler Petition at 9-10. Following enactment of Section 27A of the 1934 Act, 15 U.S.C. § 78aa-1, and remand by this Court, the court of appeals found (1) that cross-petitioners' Section 10(b) claims were timely under Section 27A,[2] and (2) that Section 27A is constitutional. Cross-respondents' petition for a writ of certiorari challenges, among other things, the constitutionality of Section 27A. Cross-petitioners have opposed that petition.

3. Were the Court to grant this cross-petition and rule in cross-petitioners' favor on the issue of equitable estoppel, consideration of the constitutionality of Section 27A would be avoided, since all Section 10(b) claims would be timely, regardless of whether the Court applied the limitations period contained in Section 27A or the limitations period in Section 9(e).

4. Were the Court to grant this cross-petition and affirm the jury's findings regarding the dates on which cross-petitioners discovered the facts constituting the violation of Section 10(b), the Section 10(b) claims of cross-petitioners in the 1970 through 1972 Classes would be timely regardless of the constitutionality of Section 27A.

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[2] The Tenth Circuit remanded the Section 10(b) claims of the 1971 Program class against cross-respondent Kothe & Eagleton for a further finding. (App. 100a-102a).

REASONS FOR GRANTING THE CROSS-PETITION

1. Prior to the enactment of Section 27A, the Tenth Circuit had ruled that the Section 10(b) claims of cross-petitioners who invested in Home-Stake's 1970 - 1972 Programs were barred by the one-year limitations period contained in Section 9(e) of the 1934 Act because those investors were placed on inquiry notice by facts relating to the SEC's action against Home-Stake in 1971. The Tenth Circuit ruled that under Section 9(e), an action must be commenced within one year of the date when the investor knows *or should have known* of the facts constituting the violation. That holding conflicts with this Court's decision in *Lampf*, decisions by other courts of appeals, decisions by the district courts, and the legislative history and plain language of Section 9(e). In order to resolve these conflicts, the Court should grant review of this critical issue, which impacts every case brought under Section 10(b) that may be potentially time-barred by Section 9(e). Review is not necessary, however, unless the Court chooses to review the constitutionality of Section 27A, since the Section 10(b) claims of the 1970 - 1972 Classes—the classes affected by this Section 9(e) issue—were found by the Tenth Circuit to be timely under Section 27A.

Section 9(e) provides in pertinent part:

> No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

In *Lampf*, the Court held that claims under Section 10(b) are to be governed by that provision:

> Litigation instituted pursuant to § 10(b) and Rule 10b-5 therefore must be commenced within one year after the discovery of the facts constituting

> the violation and within three years after such violation.

111 S.Ct. at 2782.

Lampf expressly rejected the notion that Section 9(e) is subject to the doctrine of equitable tolling—that is, that the investor's time begins to run when he discovers, or in the exercise of reasonable diligence should have discovered, the facts constituting the violation:[3]

> [I]t is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure.
>
> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary.

Id. at 2782.

In contrast to Section 9(e) of the 1934 Act, the limitations period contained in Section 13 of the 1933 Act, 15 U.S.C. § 77m, provides for both actual and constructive discovery:

> No action shall be maintained to enforce any liability created under section 77k or 77*l*(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, *or after such discovery should have been made by the exercise of reasonable diligence* . . . .

---

[3] The doctrine of equitable tolling, as quoted in *Lampf*, states that " 'where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.' *Bailey v. Glover,* 21 Wall 342, 348, 22 L. Ed 636 (1874)." 111 S.Ct. at 2782.

(Emphasis added). In *Lampf*, the Court noted the differences between the 1-and-3-year limitations periods contained in the 1934 and 1933 Acts and expressly held that to the extent those differences proved significant, the language of Section 9(e) governs claims under Section 10(b). 111 S.Ct. at 2782 n. 9.[4]

The Tenth Circuit's original opinion, as amended on rehearing, conflicts with *Lampf* and the plain reading of Section 9(e). In its original opinion, the Tenth Circuit held that under *Lampf*, cross-petitioners' Section 10(b) claims were governed by the limitations period in Section 13 of the 1933 Act. Applying that Section's one-year, inquiry-notice limitations period, the Tenth Circuit ruled that the claims of the 1970-1972 investors were time-barred. It reasoned that those investors were put on inquiry notice by the SEC's litigation with Home-Stake in 1971 and should have discovered the violation of Section 10(b) more than one year prior to the date this action was commenced. (App. 50a).

Supported by the SEC as *amicus curiae*, cross-petitioners sought rehearing. In granting rehearing, the court of appeals clarified its prior opinion, explaining that under *Lampf*, the Section 10(b) claims are governed by the limitations period in Section 9(e) of the 1934 Act. Rejecting cross-petitioners' and the SEC's argument that the one-year period under Section 9(e) begins to run from actual discovery of the facts

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[4] *Lampf* states:

> The Commission notes, correctly, that the various 1-and-3-year periods contained in the 1934 and 1933 Acts differ slightly in terminology. To the extent that these distinctions in the future might prove significant, we select as the governing standard for an action under § 10(b) the language of § 9(e) of the 1934 Act, 15 USC § 78i(e) [15 USCS § 78i(e)].

111 S.Ct. at 2782 n. 9.

constituting the violation, however, the Tenth Circuit held that Section 9(e) requires that the action be commenced within one year of the date when an investor knows or should have known of the violation. (App. 52a-54a). Adopting its previous reasoning under Section 13 of the 1933 Act, the court of appeals held that cross-petitioners' Section 10(b) claims were time-barred. (App. 54a).

In reaching the conclusion that an inquiry notice standard must be read into Section 9(e), the Tenth Circuit relied on the doctrine of equitable tolling (App. 54a, n. 5), precisely that which this Court *rejected* in *Lampf*. Thus, both the Tenth Circuit's conclusion and its reasoning conflict with *Lampf*. As one commentator noted about the Tenth Circuit's application of an inquiry notice standard under Section 9(e), "[t]he first appellate court to consider this question after *Lampf* got it wrong." Johnson, *Securities Fraud and the Mirage of Repose*, 1992 Wis. L. Rev. 607, 623 (1992).

In addition, the decision of the Tenth Circuit conflicts with the opinion of the Third Circuit in *Gruber v. Price Waterhouse*, 911 F.2d 960 (3d Cir. 1990). In that case, the district court had erroneously stated that Section 10(b) claims were governed by the limitations period of Section 13 of the 1933 Act. The Third Circuit clarified that Section 10(b) claims, as decided in *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir.), *cert. denied*, 488 U.S. 849 (1988), were governed by the limitations period contained in the 1934 Act, "which does not provide for inquiry notice." 911 F.2d at 964 n. 4.[5]

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[5] The court in *Gruber* found the district court's error harmless because of its determination that the 1-and-3-year statute of limitations announced in *Data Access* should be applied prospectively. 911 F.2d at 964 n. 4.

There is conflict on this issue within the Second Circuit. That Circuit adopted the limitations period in Section 9(e) in the pre-*Lampf* decision of *Ceres Partners v. GEL Associates*, 918 F.2d 349, 361-64 (2d Cir. 1990), relying on legislative history of the 1934 Act indicating Congress' intent that the one-year period should run from actual discovery. Subsequent to *Lampf*, however, a different panel of the Second Circuit in *Henley v. Slone*, 961 F.2d 23 (2d Cir. 1992) stated that *Ceres* "announced a uniform limitations period of the earlier of one year from the date the fraud was or reasonably should have been discovered . . ." 961 F.2d at 24. Judge Haight in *Werner v. Satterlee, Stephens, Burke & Burke*, 797 F. Supp. 1196 (S.D.N.Y. 1992), cogently summarized the confusion in the Second Circuit and *Henley*'s apparent conflict with *Lampf* and the Third Circuit:

> The issue then is the one-year period from plaintiffs' discovery of defendants' fraud. That means actual discovery, not when plaintiffs might have discovered it by the exercise of due diligence.
>
> Certainly that is the way the Third Circuit articulated the rule in *Data Access*, which the Second Circuit adopted in *Ceres*. As the Third Circuit subsequently pointed out in *Gruber v. Price Waterhouse*, 911 F.2d 960, 964 n. 4 (3rd Cir. 1990), *Data Access* "relied upon the Securities Exchange Act of 1934 which does not provide for inquiry notice." So too in *Ceres*, Judge Kearse's opinion for the Second Circuit looks to §§ 9 and 18(a) of the 1934 Act as source material for the uniform federal limitations periods in securities cases. 918 F.2d at 362. §§ 9(e) and 18(c) both speak in terms of "one year after the discovery of the facts constituting the violation." In *Lampf* the Supreme Court performed the same analysis. . .

> I am therefore respectfully puzzled by Judge Newman's statement in *Henley*, 961 F.2d at 24, that *Ceres* "announced a uniform limitations period of the earlier of one year from the date the fraud was *or reasonably should have been discovered* or three years from the date of the transaction." (emphasis added). I understand the one-year period to run from a plaintiff's actual discovery of fraud, whether or not he should have discovered it earlier.

797 F. Supp. at 1203-04.[6]

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[6] Other district courts, citing *Lampf*, have also applied an actual discovery standard. *See, e.g., Slavin v. Morgan Stanley & Co., Inc.*, 791 F. Supp. 327, 332 (D. Mass. 1992) ("The period of limitation is one year from actual discovery of the fraud .... The defendants' attempt to employ the 'reasonable diligence' standard to toll the limitation period is contrary to the specific guidance issued by the Court in *Lampf*...."); *Hauman v. Illinois Power Co.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,882, at 93,606 (C.D. Ill., Aug. 29, 1991) ("Since the one year period in § 9(e) begins to run only when the violation is discovered, the Supreme Court held that tolling is unnecessary. This rationale would not apply if diligence and inquiry notice were relevant considerations... Thus, the language of § 9(e), the relevant case law interpreting that section, and *Lampf* all require that the one year limitation period does not begin to run until the plaintiff actually discovers the facts constituting the violation." (citations omitted)); *In re Digital Microwave Corp. Securities Litigation*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,044, at 94,596 (N.D. Cal., Oct. 19, 1992) (noting the conflict between the "inquiry notice" standard employed by the Tenth Circuit in this case and the "actual notice" standard employed in cases relying on *Lampf*, the court found the "actual notice" cases "more persuasive").

The legislative history of Section 9(e) also supports an actual notice standard. Senator Fletcher, floor manager of the 1934 Act, explained:

> [T]he thought was that a man ought not to delay suit more than 1 year after he discovers the fraud. If he has been injured and finds that he has been injured, he ought to bring his action within a reasonable time, and we fix that time at 1 year. If he has not discovered it, the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed.

78 Cong. Rec. 8198 (1934). *See also* comments by Senators Barkley and Kean which likewise addressed only actual discovery. *Id.* at 8198, 8199, 8201.

An inquiry notice standard is inconsistent with Congress' two articulated rationales for the one-year provision in Section 9(e). First, Congress sought to prevent "investor hedging"—the perceived practice of refraining from filing suit after discovering a violation while waiting to see if the price of the securities goes up. *Id.* at 8199 (remarks by Senator Kean). Second, Congress sought to discourage an investor from holding the threat of suit over the perpetrator's head:

> But if a man discovers within 6 months, or 1 month, after he has been defrauded that he has been defrauded—and he knows it just as well then as he would know it 3 years from that date—it does seem that he ought not to be allowed to let the whole period of the limitation run . . . [S]hould there not be a reasonable limitation upon his power to hold over the opposite party for 5 or 6 years the possibility of a suit?

Id. at 8200-201 (remarks by Senator Barkley).

The two rationales make sense only where the claim is unquestionably known to the investor. An investor cannot engage in "hedging" without being aware of the option to sue, and an investor cannot hold the threat of litigation over a defendant unless the investor knows of the claim. By reading an inquiry notice standard into Section 9(e), the Tenth Circuit undercuts both stated rationales.[7]

This case is particularly appropriate for resolving the conflicting decisions under Section 9(e). The jury, in answers to special interrogatories, specifically found that no class representative discovered his or her Section 10(b) claim more than one year before the action was commenced. (App. 130a-198a). The sole basis for the Tenth Circuit's rejection of those findings was its own determination, as a matter of law, that investors were placed on inquiry notice by the SEC action in 1971. There is no evidence that investors actually discovered the facts constituting the violation of Section 10(b) more than one year prior to commencing suit. If Section 9(e) applies in this case because of the asserted unconstitutionality of Section 27A, then the Section 10(b) judgments of the 1970 - 1972 classes turn in the first instance on the critical difference between actual notice and inquiry notice and the proper interpretation of Section 9(e) and *Lampf*. Accordingly, the Court should consider this question before it addresses the constitutionality of Section 27A.

2. In the Dennler Petition, cross-petitioners have sought review of the decision of the Tenth Circuit holding the Section 11 claims of the 1970-1972 class members time-barred under the one-year limitations period in Section 13 of the 1933 Act. Dennler Petition 13-21. The reasons why that petition should be granted apply with equal force to the pre-

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[7] *See also* Johnson, *Securities Fraud and the Mirage of Repose*, 1992 Wis. L. Rev. 607, 621-23 (1992).

Section 27A decision of the Tenth Circuit regarding claims under Section 10(b) of the 1934 Act. Accordingly, even if the Tenth Circuit correctly read an inquiry notice standard into Section 9(e) of the 1934 Act, the Tenth Circuit improperly found the Section 10(b) claims to be time-barred. The Tenth Circuit ruled as a matter of law that the 1970 Program rescission offer implemented in settlement of the SEC enforcement action placed investors in the 1970-1972 programs on inquiry notice of a wholly distinct fraudulent scheme perpetrated by Home-Stake, where (a) the limited violations of law alleged by the SEC had apparently been cured by the rescission offer prospectus, (b) no other evidence of fraud by the issuer was disclosed or apparent, and (c) the jury specifically found that investors did not discover and could not with reasonable diligence have discovered the fraud until 28 months later. The Tenth Circuit's ruling conflicts with the decisions of other courts of appeals, improperly substitutes its own view of the inferences to be drawn from the SEC enforcement action, and seriously compromises the policies of the federal securities laws. *See* Dennler Petition at 13-21.

A decision in cross-petitioners' favor on this issue would make the Section 10(b) claims of the 1970-1972 class members timely regardless of the constitutionality of Section 27A.

3. Cross-petitioners have also sought review of the Tenth Circuit's holding that the doctrine of equitable estoppel is inapplicable as a matter of law to claims under Section 11 of the 1933 Act. Dennler Petition at 21-28. The reasons for granting review on that issue, which are incorporated herein by reference, apply with equal or greater force to cross-petitioners' fraud claims under Section 10(b) of the 1934 Act. Even if the 1-and-3-year limitations period in Section 9(e) of the 1934 Act is applied to cross-petitioners' Section 10(b) claims, the doctrine of equitable estoppel

renders the Section 10(b) claims of all cross-petitioners timely.

Prior to reaching a constitutional question, all nonconstitutional grounds for decision must first be considered. *Jean v. Nelson,* 472 U.S. 846, 854 (1985). As the Court stressed in *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944), it should not pass upon questions of constitutionality "unless such adjudication is unavoidable." The district court concluded that cross-respondents were estopped from raising a limitations defense by numerous independent fraudulent acts over the nine years from 1965 to 1973 which prevented cross-petitioners, the SEC, the IRS and the federal courts from discovering various violations of the federal securities laws. (App. 110a-111a). The court of appeals, in conflict with this Court's decision in *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231 (1959), and decisions of other courts of appeals construing similar statutes of limitations, incorrectly concluded that the doctrine of equitable estoppel "is not available to avoid the statute of repose established by Section 13 [of the 1933 Act]." (App. 38a). The holding is equally incorrect as applied to the three-year limitations period contained in Section 9(e) of the 1934 Act for the reasons stated at pages 21-28 of the Dennler Petition. Before the Court considers the constitutionality of Section 27A, it should review the equitable estoppel issue, which is dispositive.

CONCLUSION

If the Court chooses to review the constitutionality of Section 27A of the 1934 Act, which cross-petitioners oppose, this cross-petition for a writ of certiorari should be granted as well. The issues raised by this cross-petition should be considered before addressing any constitutional question.

Respectfully submitted,

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No. 92-1294

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS H. THORNER, et al.,

Cross-Petitioners,

v.

WYNEMA ANNA CROSS, EXECUTRIX, et al.,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

JURISDICTION

Review of the Section 9(e) issues is not appropriate until this Court first considers the constitutionality of Section 27A.[1] Cross-Petitioners, however, argue that if certiorari is granted,[2] this Court should consider the Section 9(e) and estoppel issues prior to consideration of the constitutionality of Section 27A. Their argument is defective because it ignores the fact that the Tenth Circuit, after the

[1] 15 U.S.C. §78i(e), 15 U.S.C. §78aa-1.

[2] Rule 13.5 provides that a cross-petition which would otherwise be untimely will not be "granted unless a timely petition for a writ of certiorari of another party to the case is granted."

enactment of Section 27A, applied the Oklahoma two-year limitation period to reinstate the judgments being appealed and did not apply Section 9(e).

If Section 27A is held to be constitutional, Cross-Petitioners' Section 9(e) issues are moot. Only if Section 27A is held unconstitutional by this Court would the Section 9(e) issues, as applied by *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. ____, 111 S.Ct. 2773 (1991), be ripe for review. In any event, the constitutionality of Section 27A is a threshold consideration. Proceeding as Cross-Petitioners suggest would require this Court to render an advisory opinion, contrary to the constitutional limitation of Article III to decide only cases and controversies.

STATEMENT OF THE CASE

This counter-statement is necessary to provide an understanding of the issues before this Court.

Cross-Petitioners erroneously assert that the Tenth Circuit's decision pertaining to "inquiry notice" was based as a matter of law on the SEC enforcement action. (Cr. Pet. 12)[3] To the contrary, the Tenth Circuit found, as a matter of law (App. 43a), that the investors in the 1970, 1971 and 1972 POCs, more than one year before their Section 10(b) claims were filed, were placed on inquiry notice by the following events: (1) on February 10, 1971, the SEC sued Home-Stake for fraud (App. 26a); (2) on February 16, 1971, the SEC fraud action was reported in the

[3] "Cr. Pet." citations refer to the Cross-Petition for Writ of Certiorari filed in this case. "App." citations refer to the Appendix to the Petition in *Dennler v. Trippet*, No. 92-1003, filed by the Cross-Petitioners here.

Wall Street Journal (App. 27a); (3) on April 30, 1971, the court-ordered rescission offer, which described the SEC fraud action, was mailed to the 1970 participants (App. 27a); (4) the 1971 and 1972 prospectuses described the SEC fraud action (App. 43a n. 36); and (5) the 1970, 1971,[4] and 1972 class representatives, all of whom were sophisticated investors, admitted knowledge of these facts. (App. 43a-46a)

REASONS FOR DENYING THE WRIT

The Cross-Petition is primarily a brief on the merits rather than a petition setting forth reasons for issuing a writ of certiorari. Therefore, Cross-Respondents believe it to be necessary, to some extent, to respond accordingly.

I.

THE TENTH CIRCUIT'S APPLICATION OF CONSTRUCTIVE KNOWLEDGE TO COMMENCE THE SECTION 9(e) LIMITATION PERIOD IS CONSISTENT WITH ALL OTHER CIRCUITS.

Cross-Petitioners argue that the Tenth Circuit's interpretation of Section 9(e), requiring investors to commence an action "within one year of the date when the investor knows, *or should have known*, of the facts constituting the violation" conflicts with this Court's decision in *Lampf*. They also argue, inaccurately, that the interpretation of Section 9(e) to allow constructive discovery conflicts with decisions of other courts of appeals, district courts, and

[4] Warren, the 1971 class representative, invested in all the Home-Stake programs from 1964-1972, sold two units back to Home-Stake under his buy-back agreement in 1966 and 1967, and in 1971 received and rejected the Rescission Offer.

the "legislative history and plain language of Section 9(e)." (Cr. Pet. 4)

Cross-Petitioners' contention that the one-year period begins to run from the date of actual discovery is based upon a misreading of this Court's decision in *Lampf*. In *Lampf*, this Court stated that the one-year period in Section 9(e) "begins after discovery of the facts constituting the violation." 111 S.Ct. at 2782. This statement simply recites the operative terms of the statutory language. Cross-Petitioners, however, erroneously contend that this language constitutes a holding that the Section 9(e) limitation period does not commence until *actual* discovery has occurred.

Cross-Petitioners would abolish the one-year limitation created by Section 9(e) absent specific proof of the state of mind of the persons alleging injury. Using the subjective *actual discovery* standard rather than the objective *constructive discovery* standard, the Cross-Petitioners convinced the district court and a jury that the class representatives had not "discovered" their Section 10(b) claims until *September, 1973*, even though those claims had been filed in *March, 1973*. The absurdity of Cross-Petitioners' argument is illustrated by the testimony of the 1965 class representative, who stated to a co-investor in 1967, that Home-Stake "may have deteriorated into a Ponzi-like situation . . . ." However, he disclaimed *actual knowledge* until September, 1973, six months after the *Anixter* complaint was filed.

As a general rule, a "discovery" limitation period begins to run "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Trotter v. Int'l Longshoremen's and Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983). There is no conflict among

the circuits on this rule of interpretation of statutes of limitations.[5]

Federal courts have rejected the "actual discovery" standard advocated by Cross-Petitioners. In *NLRB v. Allied Prod. Corp.*, 548 F.2d 644, 651 (6th Cir. 1977), the court stated the general rule "that a limitation period begins to run 'when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation].' " (citations omitted) The "reasonable diligence" requirement is read into all statutes of limitation. *See Alcorn*, 878 F.2d at 1108; *Kropinski*, 853 F.2d at 956; *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).

Under an objective standard, " 'discovery' means either actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation." *Azalea Meats v. Muscat*, 386 F.2d 5, 8-9 (5th Cir. 1967). This definition of the "discovery rule" has been specifically applied to the limitation periods of the 1934 Act. In *Rosenberg v. Hano*, 121 F.2d 818, 821 (3d Cir. 1941), the court interpreted Section 9(e) to require an investor "to use reasonable diligence toward discovering the fraud after the transaction is completed." In *Walck v. American Stock Exchange*, 687 F.2d 778, 792 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983), the three-year period in Section 9(e) was held to be a complete bar, regard-

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[5] *Rivera-Muriente v. Agosto-Alicea*, 959 F.2d 349, 353 (1st Cir. 1992); *Santos v. Dist. Council of New York City*, 619 F.2d 963, 969 (2d Cir. 1980); *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991); *Alcorn v. Burlington N. R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989); *Alexander v. Beech Aircraft*, 952 F.2d 1215, 1226 (10th Cir. 1991); *Samples v. Ryder Truck Lines*, 755 F.2d 881, 887 (11th Cir. 1985); and *Kropinski v. World Plan Executive Council*, 853 F.2d 948, 956 (D.C. Cir. 1988).

less of the extent of plaintiffs' knowledge. Parenthetically, the court explained that the one-year discovery rule in Section 9(e) was triggered when "plaintiff discovered (or should have discovered) the wrong." 687 F.2d at 792. The court in *Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959), considering Section 29(b) of the 1934 Act containing language similar to Section 9(e), ruled that the word "discovery" means "either actual knowledge or notice of facts which, in the exercise of due diligence, would have led to actual knowledge of the violation."[6]

Federal courts have interpreted state statutes of limitation with language similar to that in Section 9(e) and ruled that the word "discovery" includes constructive as well as actual discovery. In *Sade v. Northern Natural Gas Co.*, 483 F.2d 230, 235 (10th Cir. 1973) (applying Oklahoma law), the Court stated: "The phrase 'until the discovery of the fraud' does not necessarily mean until the party has actual notice of the fraud, and fraud is deemed to have been discovered when, on the exercise of reasonable diligence, it could, and should have been, discovered." It is settled law that the word "discovery" used in limitations statutes means "actual or constructive discovery."[7]

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[6] The absence of "reasonable diligence" language was probably an oversight, and Section 9(e) should be read to include that language. H. Bloomenthal, SECURITIES LAW HANDBOOK, §25.02[11] at 941 (1991-92 ed.) and L. Loss, FUNDAMENTALS OF SECURITIES REGULATIONS at 991 (2d ed. 1988). See Congressional Record, Senate, May 7, 1934, at 8198, for the legislative history of the 1934 Amendment of Section 13 of the 1933 Act that was specifically intended to "conform" the limitation of the 1933 Act to the limitation periods of the 1934 Act; *see also Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir.), *cert. denied*, 484 U.S. 943 (1987), for a discussion of the legislative history.

[7] *See, e.g., Duncan v. Leeds*, 742 F.2d 989, 991 (6th Cir. 1984) (applying Tennessee law); *Owens v. White*, 380 F.2d 310, 313 (9th

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Cross-Petitioners' argument confuses subjective actual discovery with the duty to exercise due diligence. Actual knowledge is not the test. *Volk v. D. A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987). Contrary to Cross-Petitioners' claim, neither constructive discovery nor actual discovery of a cause of action has ever been interpreted by a court to be dependent upon a plaintiff's complete knowledge of all of the facts and circumstances concerning an alleged fraud. *See United States v. Kubrick*, 444 U.S. 111, 122-23 (1979). "Inquiry notice is triggered by evidence of the possibility of fraud; it does not require full exposition of the fraud itself." *Ebrahimi v. E. F. Hutton & Co.*, 852 F.2d 516, 523 (10th Cir. 1988). The limitation period commences when a plaintiff has knowledge sufficient to put him on notice of any alleged fraud, and "[does] not await [his] leisurely discovery of the full details of the alleged scheme." *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970).

Prior to the enactment of the federal securities laws, it was established that if a claimant had sufficient knowledge to put him on notice as to any alleged fraud, the statutory period began to run. Judge Learned Hand wrote "[a] man may not let time slip by while he learns whether his wrongs are to be measured by tens, or hundreds, or thousands." *Talmadge v. United States Shipping Board*, 54 F.2d 240, 244 (2d Cir. 1931). Words with a fixed legal or judicially settled meaning must be presumed to have

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[7] *continued*

Cir. 1967) (applying Idaho law); *Sade v. Northern Natural Gas Co.*, 483 F.2d at 235 (applying Oklahoma law); *Briskin v. Ernst & Ernst*, 589 F.2d 1363, 1367 (9th Cir. 1978) (applying California law); and *First Nat'l Bank of Bowie v. Fidelity & Cas. Co.*, 634 F.2d 1000, 1004-05 (5th Cir. Unit A Jan. 1981) (applying Texas law).

been used in that sense. *United States v. Merriam*, 263 U.S. 179, 187 (1923). Therefore, Section 9(e) must be interpreted to incorporate the principles of law that existed when that statute was enacted, including the principle that inquiry notice will commence the statutory limitation period.

Cross-Petitioners inaccurately construe several district court decisions to support their claim of a conflict with the Tenth Circuit. (Cr. Pet. 9, n. 6) The trial court in *Hauman v. Illinois Power Co.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,882 at 93,606 (C.D. Ill. 1991), considered the defendant's motion for summary judgment and ruled on the standards of proof necessary for summary judgment. *Hauman* was not addressing the level of proof necessary to establish actual discovery. *Hauman's* determination that Section 9(e) and *Lampf* require actual discovery is simply wrong.

Werner v. Satterlee, Stephens, Burke & Burke, 797 F. Supp. 1196, 1204-05 (S.D.N.Y. 1992) and the other district court cases relied on by Cross-Petitioners involved motions to dismiss. (Cr. Pet. 9) Those courts simply concluded that the one-year period in Section 9(e) turns on "discovery of the facts constituting the violation." None of those courts had the benefit of a factual record to determine whether the plaintiffs had actual or constructive knowledge.

Cross-Petitioners next turn to the congressional debates to support their conclusion that the one-year period commences upon actual discovery. (Cr. Pet. 10) However, this Court has cautioned against placing too much reliance on legislative debates. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). "[C]ontemporaneous remarks of a single legislator who sponsors a bill are not controlling in ana-

lyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980). The key is consistency between what was said in the debates and the language of the statute finally adopted.

Cross-Petitioners only quote isolated statements from the debates on the 1934 Act, but fail to provide the full context from which they were drawn. Moreover, they fail to disclose that Senator Fletcher's comments about discovery of the fraud were made in support of an amendment for *reducing* the limitation period. 78 Cong. Rec. 8198 (1934). Senator King urged that the outer period of time for bringing suit be reduced even further. *Id.* He suggested that the outer limits, when suit could not be filed at all, regardless of discovery, should be no more than three or four years. *Id.* Senator Fletcher then remarked that "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed." *Id. Lampf* is consistent with the plain language of Section 9(e) as well as the legislative history as a whole.

Cross-Petitioners urge this Court to grant review and to adopt an interpretation of Section 9(e) that would require proof of actual discovery. To do so would destroy the advantages of federal uniformity over the state borrowing doctrine. A standard of proof under Section 9(e) that requires actual discovery would have the effect of establishing a limitation period for each individual plaintiff. This would mean, in a class action suit, that there would be a separate limitation period for each class member.

The long-standing principle of inquiry notice is accepted by all circuits, and the Cross-Petitioners have demonstrated no conflict. Therefore, the Cross-Petitioners raise no issue that this Court need review.

II.

THE CROSS-PETITION DEMONSTRATES NO CONFLICT AMONG THE CIRCUITS, IS BASED PRIMARILY UPON FACTUAL ISSUES AND PRESENTS NO IMPORTANT FEDERAL OR CONSTITUTIONAL ISSUES REGARDING THE TENTH CIRCUIT'S DETERMINATION OF INQUIRY NOTICE UNDER SECTION 9(e).

Cross-Petitioners present a substantial part of their argument on their second and third questions by reference to their Petition in *Dennler v. Trippet*, No. 92-1003. The following response is, therefore, substantially the same as in the Brief in Opposition filed in No. 92-1003.

A. There Is No Conflict Among the Circuits.

Cross-Petitioners' second question is limited to the application of the one-year limitation period of Section 9(e) to Cross-Petitioners' Section 10(b) claims. Cross-Petitioners erroneously contend that the Tenth Circuit's opinion is in direct conflict with *Robertson v. Seidman & Seidman*, 609 F.2d 583 (2d Cir. 1979). Cross-Petitioners misconstrue *Robertson* to hold that inquiry notice cannot be triggered by a "wholly distinct fraudulent scheme." To the contrary, the same circuit, in *Arneil v. Ramsey*, 550 F.2d 774, 781 (2d Cir. 1977), held that media coverage, regarding violations of the record keeping provisions of the securities laws, was sufficient to constitute inquiry notice of another independent fraud. *Robertson* does not overrule *Arneil*. *Robertson* discusses fraudulent concealment of a single underlying fraud. *Robertson*, 609 F.2d at 593.[8] Both the case

[8] Cross-Petitioners argue that only the second SEC fraud suit put them on inquiry notice of these claims. Prior to their petition No. 91-1340, raising some of the issues presented here, Cross-Petitioners argued that it was a *Wall Street Journal* article reporting

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at bar and *Arneil* deal with two independent, actionable frauds. Therefore, *Robertson* is inapposite and not in conflict with the Tenth Circuit decision in this case.

B. Cross-Petitioners' Second Question Is Based Primarily Upon Factual Issues Fully Considered by the Tenth Circuit.

Cross-Petitioners have drafted their second question very narrowly to imply that the Tenth Circuit resolved the question of "inquiry notice" solely on the effect of the rescission offer. This is not an accurate statement of the basis of the Tenth Circuit's holding.

Factors such as market conditions, legal actions, or adverse or contradictory information are sufficient to place an investor on inquiry notice and to commence the limitation period. *See Gaudin v. KDI Corp.*, 576 F.2d 708, 712 (6th Cir. 1978); *Berry Petroleum v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975); *Hupp v. Gray*, 500 F.2d 993, 996-97 (7th Cir. 1974); and *Arneil*, 550 F.2d at 781, all cited with approval in *Robertson*, 609 F.2d at 587-89. Furthermore, newspaper articles may be considered in determining inquiry notice. *Kennedy v. Tallant*, 710 F.2d 711, 716 (11th Cir. 1983); *Berry Petroleum*, 518 F.2d at 410. Finally, investor sophistication is a significant factor to be considered with regard to events sufficient to constitute inquiry notice. *Arneil*, 550 F.2d at 781; *Jones v. Ford Motor Co.*, 599 F.2d 394, 399 (10th Cir. 1979).

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[8] *continued*

Home-Stake's filing for reorganization which put them on inquiry notice. Obviously, Cross-Petitioners have changed the event that they claim triggered inquiry notice for purposes of manufacturing a perceived, but non-existent, conflict with *Robertson*.

The record before the Tenth Circuit demonstrated the Cross-Petitioners' constructive knowledge of the alleged fraud from, *inter alia*: (1) the inconsistencies between the prospectuses and the program books regarding income projections; (2) the check stubs and tax summaries which described "pro rev" as income other than from oil and gas production; and (3) the annual summaries of the status of the development in the prior programs which clearly demonstrated inconsistencies between Home-Stake's projections and actual development. Even if the Cross-Petitioners were not placed on inquiry notice on the date of their investment as a result of the inconsistencies between the prospectuses and program books, they were on at least inquiry notice from the date they received the first check stub or tax summary which reported their income as being from "other" than oil and gas production.

The voluntary payments, which Cross-Petitioners refer to as the "Home-Stake fraud," were designated by Home-Stake as "pro rev" or "program revenue" payments. These payments were not represented by Home-Stake as income from oil and gas production, as Cross-Petitioners argue. Rather, they were represented as income from sources "other" than from oil and gas production. Full disclosure of the source of pro rev payments was made by Norman C. Cross, Jr. to the IRS, which approved and allowed pro rev payments as costs in the years that the payments were made. Home-Stake also disclosed the pro rev payments by stating in the 1971 Prospectus filed with the SEC:

> Cash returned to Investors includes funds derived from production and a return upon their capital contributions to the Programs as payment for the use of the contributed funds by Home-Stake . . . In the case of the 1965 to 1969 Programs, inclusive . . . funds

derived from the latter sources have constituted virtually all of the net cash returned to Investors.

In December 1970, the SEC issued a formal Order of Investigation of the 1970 POC and, on February 10, 1971, filed a complaint in the district court charging Home-Stake, its officers and directors, and the 1970 POC with violation of the anti-fraud provisions of the federal securities laws. In April 1971, the Final Judgment of Permanent Injunction was entered. Furthermore, on April 30, 1971, the Rescission Offer Prospectus and a copy of the final judgment, describing the SEC fraud charges, were mailed to each of the investors in the 1970 POC. Two hundred seventy-nine investors accepted the rescission offer and received the return of their investments, plus accrued interest.

The 1971 Prospectus, effective November 3, 1971, and the 1972 Prospectus, effective October 11, 1972, also disclosed, to the 1971 and 1972 investors, details of the SEC fraud charges. In addition, six lawsuits were filed between June 1971 and January 1973 by various investors alleging that Home-Stake had violated the anti-fraud provisions of the federal securities laws. (App. 45a n. 39)

The Tenth Circuit held that these facts collectively constituted " 'great glowering clouds' . . . sufficient to put plaintiffs on notice that something was amiss" and were "enough of a 'storm warning' to start the clock as a matter of law." (App. 43a, 47a) The Tenth Circuit recognized that the three class representatives knew these facts, and noted that each admitted that they "made their own decisions based as much on tax considerations as investment concerns." (App. 44-46a)

Cross-Petitioners now ask this Court to find that constructive discovery could not have occurred prior to Sep-

tember, 1973. However, their suit for fraud was filed on March 30, 1973, *six months earlier*. Cross-Petitioners' argument that constructive discovery could first occur six months after actual discovery is incredible.

Independent of the question of when inquiry notice properly commenced, granting certiorari on the second question presented would also require this Court to consider an additional defect in the Cross-Petitioners' Section 10(b) claims, which arises from post-filing amendments to the class action complaints. The 1971 POC claims against Kothe & Eagleton and the first claims by the 1972 POC were added by amendment on May 24, 1974, more than one year after the original complaint in this action was filed and, therefore, are time-barred. (App. 47a)

The existence of constructive discovery depends upon facts unique to each case. *Robertson*, 609 F.2d at 591. As this Court has stated, it does not grant certiorari "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). The question of when inquiry notice occurred is a fact-dependent issue peculiar to these Cross-Petitioners, and this Court "does [not] sit for the benefit of particular litigants." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955).

C. No Important Federal or Constitutional Issues Are Presented.

Cross-Petitioners state that the Tenth Circuit's holding as to when inquiry notice occurred as a matter of law "flies in the face of common sense . . . and improperly invades the province of the jury." If anything "flies in the face of common sense," it is the jury finding that discovery of the fraud could not have occurred prior to

September, 1973, which ignores the fact that Cross-Petitioners had actual knowledge of the fraud and had already filed their securities fraud claims six months earlier.

Based upon the whole record, the Tenth Circuit correctly concluded that "a single question of law predominates our review." (App. 24a) This Court has long recognized that "if the evidence is uncontradicted and raises only a question of law," there is no violation of the Seventh Amendment right to a jury trial when an appellate court reverses and directs entry of judgment. *Tull v. United States*, 481 U.S. 412, 419 (1987); *Neely v. Martin K. Eby Constr.*, 386 U.S. 317, 321-22 (1967).

There is no usurpation of a jury function, nor is there a violation of the Seventh Amendment, where the material facts are undisputed and the court establishes, as a matter of law, that a statute of limitations bars the action. *Curry v. A. H. Robins Co.*, 775 F.2d 212, 217 (7th Cir. 1985).

The Tenth Circuit was correct in setting aside the jury findings and applying the standards of review set forth in *Black, Sivalls & Bryson v. Keystone Steel Fabrication*, 584 F.2d 946, 951 (10th Cir. 1978), because "both the facts and the inferences to be drawn from the facts point so strongly in favor of one party that the court believes that reasonable men could not come to a different conclusion." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).

Cross-Petitioners state that the Tenth Circuit's opinion conflicts with "well-established principles governing appellate review of jury verdicts in securities law cases," citing *Mosesian v. Peat, Marwick, Mitchell & Co.*, 727 F.2d 873 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984). However, *Mosesian* recognized that a statute of limitations question may be decided as a matter of law "when uncontro-

verted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct." *Mosesian*, 727 F.2d at 877, citing *Kramas v. Sec. Gas & Oil*, 672 F.2d 766, 770 (9th Cir.), *cert. denied*, 459 U.S. 1035 (1982). Cross-Petitioners have not and cannot identify a conflict among the circuits. The Ninth Circuit in *Mosesian* cited cases from the Sixth and Seventh Circuits holding that this question may be decided as a matter of law. 727 F.2d at 878. The outcome in *Mosesian* is distinguishable from this case because the Ninth Circuit, in reversing the judgment notwithstanding the verdict, held that the verdict was "reasonable and [was] supported by substantial evidence." 727 F.2d at 879. The facts here do not support a similar conclusion.

The power of any court, trial or appellate, to direct entry of judgment notwithstanding a verdict, without violating the Seventh Amendment, is well established. *Neely*, 386 U.S. at 322. *See also* 5A J. Moore, J. Lucas, MOORE'S FEDERAL PRACTICE, ¶50.07[1] at pp. 50-61 through 50-64 (2d ed. 1992), and the citations therein. *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 360, 363-64 (1962), and *Robertson*, 609 F.2d at 592, cited by Cross-Petitioners, are inapposite since the evidence relevant to the issue was controverted.

Cross-Petitioners' second issue does not raise any legal question on the appropriate standard for judgment notwithstanding the verdict, nor does it raise a constitutional question. Instead, this issue is fact-based, i.e., whether a review of the record establishes that there are no material fact questions which would preclude an appellate court from entering judgment. Fact questions are not an appropriate basis for granting certiorari. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951).

III.

THE DECISION OF THE TENTH CIRCUIT WITH RESPECT TO EQUITABLE ESTOPPEL IS NOT CONTRARY TO, NOR IN CONFLICT WITH, DECISIONS OF THIS COURT OR OTHER CIRCUITS.

This Court and the various circuits uniformly define equitable estoppel as it relates to statutes of limitation to require proof that a plaintiff knew of a cause of action and, because of reliance upon a defendant's acts, failed to file the known cause of action in a timely manner. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959); *Aldrich v. McCulloch Properties*, 627 F.2d 1036, 1043 n. 7 (10th Cir. 1980); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988).

Cross-Petitioners must rely upon a misconstruction of the distinction between equitable tolling and equitable estoppel to seek review of the Tenth Circuit holding. The distinction is explained in *Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 49-50 (2d Cir. 1985):

> Unlike equitable tolling, which is involved in cases where the plaintiff is ignorant of his cause of action because of the defendant's fraudulent concealment, equitable estoppel is invoked in cases where the plaintiff knew of the existence of his cause of action but the defendant's conduct caused him to delay in bringing his lawsuit. (citations omitted)

The facts enumerated by Cross-Petitioners do not support the application of equitable estoppel. Cross-Petitioners have never argued that they knew of their claims but delayed filing suit in reliance upon any acts or representations of the Cross-Respondents. Rather, Cross-Petitioners argue that the actions of some Cross-Respondents prevented them "from discovering" their claims, that quarterly pay-

ments from other than oil and gas production were made "to conceal the absence of program development and the lack of profitable operations," and that the rescission offer prospectus constituted an act of "concealment." Thus, Cross-Petitioners tacitly acknowledge that the facts of this case do not give rise to equitable estoppel. Cross-Petitioners deny knowledge of their claims until six months after the suit was filed, and, therefore, they cannot claim to have been fraudulently induced to forego filing a known claim.

Cross-Petitioners apparently seek to misconstrue the distinction between equitable tolling and equitable estoppel, recognizing the fact that equitable tolling will not extend the three-year period of repose under Section 9(e). *Cf. Summer v. Land & Leisure*, 664 F.2d 965, 968 (5th Cir. Unit B Dec. 1981), *cert. denied sub nom. Arthur Young & Co. v. Summer*, 458 U.S. 1106 (1982); *SEC v. Seaboard Corp.*, 677 F.2d 1301, 1308 (9th Cir. 1982).

The Tenth Circuit, in its initial decisions, correctly concluded that the 1964-1969 investors "were barred from suit by the three-year statute of repose" since the suit was not filed until March 30, 1973. (App. 39a) This Court acknowledged the significance of this language in Section 13 when it construed the three-year provision of Section 9(e) as a "period of repose" not subject to any "tolling principles." *Lampf*, 111 S.Ct. at 2781-82.

The Tenth Circuit's opinion is not in conflict with *Glus, Bomba v. W. L. Belvidere, Inc.*, 579 F.2d 1067 (7th Cir. 1978), *Katz v. Amos Treat & Co.*, 411 F.2d 1046 (2d Cir. 1969), or other cases cited by Cross-Petitioners. Those cases each involved statements by defendants that caused the plaintiffs not to file suit, even though plaintiffs knew of their claims before the limitations period elapsed. There, the courts applied traditional standards of equitable estoppel.

All circuits, which have considered the application of equitable estoppel to avoid the three-year limitation period of Section 13, have rejected the principle. *See Short v. Belleville Shoe Mfg. Co*, 908 F.2d 1385, 1391 (7th Cir. 1990), *cert. denied*, 501 U.S. ____, 111 S.Ct. 2887 (1991) (collecting cases). The Tenth Circuit's ruling is consistent with those decisions. (App. 32a n. 15, 38a-39a) Furthermore, the Tenth Circuit accurately noted that here the district court's decision (which is the same as the Cross-Petitioners' contention before this Court) "is recognized in the treatises as the 'sole exception' to the three-year absolute bar under section 13." (App. 32a n. 15) The rationale of Section 13 has been applied to Section 9(e) and affirmed by this Court in *Lampf*, when it construed the three-year provision as a "period of repose," not subject to any tolling principles. *Lampf*, 111 S.Ct. at 2781-82.

The statement by the Tenth Circuit that equitable estoppel is inapplicable "when the consequence operates to trump a clear outer limit intended by Congress" does not create the conflict claimed by Cross-Petitioners. The Tenth Circuit acknowledged that "there may be circumscribed settings in which the doctrine of equitable estoppel might apply to claims governed by Section 13." (App. 37a-38a) Harold S. Bloomenthal, cited and relied upon by the Cross-Petitioners, has commented on the Tenth Circuit's opinion in this particular case, and has noted that the Tenth Circuit's rejection of equitable estoppel is not inappropriate, since

> the issue had been commingled at the trial level with the issue of equitable tolling, and what the jury was asked to decide on the equitable tolling issue was whether the defendants "intended to and did thwart and defeat" the federal courts, the IRS and the SEC, all of which has nothing to do with equitable estoppel.

H. Bloomenthal, SECURITIES LAW HANDBOOK at 1056 (1991-92 ed.).

As noted in *Glus*, the application of equitable estoppel is to be determined upon the facts of each case. 359 U.S. at 234. The Tenth Circuit correctly held upon the facts of this case, that Cross-Respondents were not equitably estopped from asserting the statute of repose. The decision by the Tenth Circuit is consistent with *Glus* and with circuit decisions interpreting Section 9(e), Section 13 and similar statutes of limitation.

A review of the facts and evidence discloses a further defect in Cross-Petitioners' contentions. The Cross-Petitioners' statement of the case imputes to all Cross-Respondents the conduct or acts of every other party, regardless of when they occurred, and regardless of whose conduct or acts might be considered acts of estoppel. However, neither estoppel nor tolling operate vicariously against persons who are not parties or privy to the transactions from which the estoppel or tolling arose. *Eldred v. Bell Tel. Co.*, 119 U.S. 513 (1886); *Branson v. Wirth*, 84 U.S. (17 Wall.) 32 (1872); *Deery v. Cray*, 72 U.S. (5 Wall.) 795 (1866).

A grant of certiorari by this Court on the third question presented would require this Court to review the facts and evidence unique to the parties to these proceedings to determine if equitable estoppel has been properly rejected by the Tenth Circuit.

The factual issues were fully considered by the Tenth Circuit and further review of such factual issues is not an appropriate basis for certiorari. *Pittsburgh*, 340 U.S. at 503; *Johnston*, 268 U.S. at 227.

CONCLUSION

The Cross-Petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS H. THORNER, *et. al.*,
Cross-petitioners,

v.

WYNEMA ANNA CROSS, EXECUTRIX, *et al.*,
Cross-respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE CROSS-PETITIONERS

ARGUMENT

1. In their Brief in Opposition to Cross-Petition, cross-respondents have not responded to a single reason advanced in the cross-petition for granting review of the first question presented—whether the limitations period contained in Section 9(e) of the Securities Exchange Act of 1934 ("1934 Act"), 15 U.S.C. § 78i(e), requires an investor to commence an action for violation of Section 10(b) within one year of actual discovery of the facts constituting the violation, as opposed to one year after the investor, in the exercise of reasonable diligence, should have discovered the

facts constituting the violation. In the cross-petition, we demonstrated that the original decision of the Tenth Circuit on this issue (1) conflicts with this Court's holding in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S. Ct. 2773 (1991); (2) conflicts with decisions of the Second and Third Circuit Courts of Appeals; and (3) conflicts with the 1934 Congress' stated rationales for enacting the one-year provision of Section 9(e). Through their silence, cross-respondents implicitly concede these conflicts.

Lampf did not, as cross-respondents state, "simply recite the operative terms" of Section 9(e) (Br. in Opp. 4). The Court held that an action under Section 10(b) "must be commenced within one year after the discovery of the facts constituting the violation . . .," 111 S. Ct. at 2782, and rejected the application of the doctrine of equitable tolling to Section 9(e):

> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary.

Id. The Tenth Circuit's original decision, which relies on the doctrine of equitable tolling to read an "inquiry notice" standard into Section 9(e) (App. 54a, n.5),[1] conflicts with both the holding and the underlying reasoning of *Lampf*.

Our cross-petition also pointed out that the Tenth Circuit's original decision was in conflict with *Gruber v. Price Waterhouse*, 911 F.2d 960, 964 n.4 (3rd Cir.

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[1] "App." refers to the separately bound appendix to the pending petition for a writ of certiorari in *William H. Dennler, et al. v. Robert S. Trippet, et al.*, No. 92-1003, filed December 11, 1992.

1990) and *Ceres Partners v. GEL Associates*, 918 F.2d 349, 361-64 (2d Cir. 1990). Cross-respondents have not even cited those cases, much less attempted to explain why there is no conflict on the interpretation of Section 9(e).[2] They instead rely on pre-*Lampf* cases applying the doctrine of equitable tolling and borrowed state-law statutes of limitations to Section 10(b) claims,[3] a practice overruled by *Lampf*.

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[2] Our cross-petition also cited several well-reasoned district court decisions since *Lampf* holding that the one-year limitation period of Section 9(e) commences upon actual discovery (Cross-Pet. 8-9). In response, cross-respondents argue that *Hauman v. Illinois Power Co.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,882 (C.D. Ill. 1991), is "simply wrong" and also fail to distinguish the remaining district court decisions, arguing only that they were decided on motions to dismiss (Br. in Opp. 8).

[3] *Ebrahimi v. E.F. Hutton & Co.*, 852 F.2d 516, 523 (10th Cir. 1988); *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988); *Volk v. D. A. Davidson & Co.*, 816 F.2d 1406, 1411-12 (9th Cir. 1987); *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970) (Section 7 of the 1934 Act); *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 8-10 (5th Cir. 1967).

Cross-respondents also rely on several cases applying equitable tolling to non-securities federal claims. *United States v. Kubrick*, 444 U.S. 111, 122-23 (1979) (Federal Tort Claims Act); *Alcorn v. Burlington N. R.R.*, 878 F.2d 1105, 1108 (8th Cir. 1989) (NLRA); *Trotter v. International Longshoremen's and Warehousemen's Union*, 704 F.2d 1141, 1143 (9th Cir. 1983) (Labor Management Reporting and Disclosure Act); *NLRB v. Allied Products Corp.*, 548 F.2d 644, 650-51 (6th Cir. 1977) (NLRA). They are irrelevant to the narrow issue presented in the cross-petition.

Similarly, the cases cited by cross-respondents interpreting state common law fraud limitations periods, *Kropinski v. World Plan Executive Council-US*, 853 F.2d 948, 955-56 (D.C. Cir. 1988) and *Sade v. Northern Natural Gas Co.*, 483 F.2d 230, 235 (10th

Rather than address *Gruber* and *Ceres*, cross-respondents miscite two other appellate decisions involving Section 9(e). *Rosenberg v. Hano*, 121 F.2d 818 (3d Cir. 1941) did not, as they assert, interpret the one-year period in Section 9(e) to begin running when the investor, in the exercise of reasonable diligence, should have discovered the fraud (Br. in Opp. 5). *Rosenberg* expressly noted that Section 9(e) "omitted" the reasonable diligence standard included by Congress in Section 13 of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. § 77m, but declined to decide the issue presented here. 121 F.2d at 821.

Cross-respondents next assert that in *Walck v. American Stock Exchange, Inc.*, 687 F.2d 778, 792 (3d Cir. 1982), *cert. denied*, 461 U.S. 942 (1983), "the court explained that the one-year discovery rule in Section 9(e) was triggered when 'plaintiff discovered (or should have discovered) the wrong' " (Br. in Opp. 5-6). What cross-respondents quote, however, is the appellees' argument in *Walck* concerning tolling of the three-year provision of Section 9(e), not the Third Circuit's holding on the one-year limitations provision. (687 F.2d at 792). In fact, the court rejected equitable tolling of Section 9(e)'s three-year limitation period

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Cir. 1973), are irrelevant to the interpretation of a federal limitations statute such as this where Congress has expressly distinguished between limitations periods based on discovery and ones requiring reasonable diligence to make discovery. The other nine equitable tolling cases cited by cross-respondents in footnotes 5 and 7 of their opposition are similarly irrelevant.

Cross-respondents' citation to *Talmadge v. United States Shipping Board*, 54 F.2d 240, 243-44 (2d Cir. 1931) (Br. in Opp. 7) is actually misleading. There, plaintiffs knew of the wrong. Only their knowledge of the extent of their losses was in question.

and stated that the one-year limitations period is tolled until discovery:

> Section 9(e) essentially enacts a one-year limitation, tolled until discovery, but erects a complete bar after three years. . . . We must "give effect to the statute as enacted" and "respect the compromise embodied in the words chosen by Congress. It is not our place simply to alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction."

Id. (Citations omitted).[4]

Cross-respondents argue that commencement of Section 9(e)'s one-year limitations period does not require "complete knowledge of all the facts" or "full exposition of the fraud itself" (Br. in Opp. 7). The argument is a red herring. The degree to which the fraud has been discovered is not at issue here, and nowhere in its opinion does the Tenth Circuit suggest that cross-petitioners discovered any part of Home-Stake Production Company's fraud more than one year before suit was filed. Rather, the question is whether the Tenth Circuit correctly read into Section

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[4] Cross-respondents (Br. in Opp. 6) also cite *Goldenberg v. Bache & Co.*, 270 F.2d 675, 681 (5th Cir. 1959), where the Fifth Circuit read a "reasonable diligence" standard into Section 29(b) of the 1934 Act. As Professor Loss has observed, *Goldenberg* ignored the contrast between Section 13 of the 1933 Act and Section 29(b). *See* L. Loss, *Fundamentals of Securities Regulation* 991 (2d ed. 1988). Moreover, the Fifth Circuit relied principally on the doctrine of equitable tolling announced in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), which *Lampf* rejected as applied to Section 9(e). 111 S. Ct. at 2782.

9(e) a provision that the one-year statute begins when the investor through the exercise of reasonable diligence should have discovered the facts constituting the violation.[5]

The cross-petition demonstrated that the Tenth Circuit's interpretation of Section 9(e) in its original decision is also inconsistent with the two rationales articulated by Congress in enacting the one-year statute. Those rationales, avoiding investor "hedging" and prolonged threat of suit, make sense only where the claim is known to the investor (Cross-Pet. 10-11). Cross-respondents urge the Court to ignore the legislative history (Br. in Opp. 8-9), citing *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 118 (1980), and *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979), both of which wrestled with the same "isolated" remarks of a single legislator, Rep. Moss, during the Congressional debates leading to enactment of the Consumer Product Safety Act. By contrast, the remarks of all the principal proponents of the 1934 Act, Senators Fletcher, Barkley and Kean, demonstrate that Congress intended the one-year limitations period of Section 9(e) to commence upon actual discovery. 78 Cong. Rec. 8198-8201 (1934). *See also* remarks of Senator Byrnes, 78 Cong. Rec. 8200 (1934).[6]

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[5] Cross-respondents' repeated use of the term "constructive discovery" further confuses the issue. (*See* Br. in Opp. 3-4, 6-7). Neither the Tenth Circuit nor any of the authorities cited by cross-respondents uses the term, much less defines it.

[6] Cross-respondents elsewhere miscite commentators' interpretations of the legislative history, arguing that Congress inadvertently omitted a reasonable diligence standard from Section 9(e). (Br. in Opp. 6, n.6). The authorities they cite do not support

Cross-respondents argue that "*Lampf* is consistent with the plain language of Section 9(e) as well as the legislative history as a whole" (Br. in Opp. 9). We agree. It is the Tenth Circuit's interpretation of Section 9(e) that is at odds with the plain wording of the statute, the holding and rationale of *Lampf*, de-

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that interpretation, however. Professor Loss nowhere suggests an "oversight"; on the contrary, he notes the "contrast" between Section 13 of the 1933 Act and the various limitations provisions found in the 1934 Act. L. Loss, *Fundamentals of Securities Regulation* 991 (2d ed. 1988). *See also* L. Loss and J. Seligman, *Securities Regulation* 4280 (3d ed. 1992) (recognizing differences between Sections 9(e) and 13).

Professor Bloomenthal, in his treatise *Securities Law Handbook*, §30.02 at 30-16 (1993), essentially admits that the legislative history does not support the theory that the difference between Section 9(e) and Section 13 is merely the result of an "oversight":

> The debate over these provisions [Sections 9(e) and 18(c)] generally assumed that actual discovery or something that would put one on notice of the fraud would be required which may be inconsistent with the specific language of Section 13.

In another treatise, Professor Bloomenthal retreats further from the "oversight" theory: "The reasons for the difference in language are not clear and may or may not have been an oversight." 3B Bloomenthal, *Securities and Federal Corporate Law* §9A.10 at 9A-27 (1992).

Cross-respondents suggest that the 1934 Congress intended to "conform" Section 13 of the 1933 Act to Section 9(e) of the 1934 Act (Br. in Opp. 6 n.6). While Congress clearly sought to make the actual time periods of the two Acts consistent (*i.e.*, one year/three years), 78 Cong. Rec. 8198 (1934), nothing in the legislative history suggests an intention by Congress to conform the explicit tolling provisions of the two Acts (*id.* at 8195-8203).

cisions of other courts of appeals, and Congress' intent.

2. Cross-respondents' response to the second question raised in the cross-petition (Br. in Opp. 10-16) is substantially identical to their response to the first question presented in *Dennler v. Trippet*, No. 92-1003. Cross-petitioners incorporate by reference their reply in that case.

3. Cross-respondents' response to the third question raised in the cross-petition (Br. in Opp. 17-20) is also substantially the same as their response to the second question presented in *Dennler v. Trippet*. Cross-petitioners incorporate by reference their reply in *Dennler v. Trippet* on that point as well. *See also* L. Loss, *Fundamentals of Securities Regulation* at 331 (1992 Supp.) (discussing the conflict in the circuits on the issue of whether estoppel may extend the three-year limitations period of Section 13 of the 1933 Act and citing the conflict between *Katz v. Amos Treat & Co.*, 411 F.2d 1046, 1055-56 (2d Cir. 1969) and the Tenth Circuit's decision in this case).

CONCLUSION

Cross-petitioners oppose cross-respondents' petition for a writ of certiorari to review the constitutionality of Section 27A of the 1934 Act. Should the Court choose to grant their petition on that issue, however, the cross-petition should be granted as well and the issues raised therein should be considered before addressing any constitutional question.

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